

HENG LONG MOTOR TRADING CO.

v.

OSMAN BIN ABDULLAH

HIGH COURT BORNEO, KUCHING
DATUK CHONG SIEW FAI J.
[CIVIL APPEAL NO.KG.16 OF 1993/I]
16 APRIL 1994

SALE OF GOODS: Sale of van - Customer paying deposit to dealer - Balance of purchase price paid through financing - Car subsequently seized by Customs Department - Whether there was a sale between customer and dealer - Whether dealer liable for damages resulting from seizure - Law applicable in Sarawak - Whether Sale of Goods Act 1979(UK) applicable - Consideration of s. 5(2) Civil Law Act 1956.

The first plaintiff/customer purchased a van from the defendant/dealer for the sum of RM13,000 for which he paid a sum of RM5,500 to the dealer. The dealer issued two receipts for the total sum of RM5,200 acknowledging receipt of the sums stated therein. The balance of the purchase price was paid by the second plaintiff/finance company under a hire purchase agreement entered into between the finance company and the customer.

After the customer had settled the amount owing to the finance company, the van was seized by the Customs Department for investigations into its importation. The van was resold to the customer by the Customs Department after a lapse of almost 5 years.

The customer sued the dealer for damages for breach of warranty and the learned trial Magistrate found in favour of the customer. The dealer appealed and the question that arose was whether the learned Magistrate was justified in holding that there had been a sale of the van by the dealer to the customer prior to the entry of the hire purchase agreement between the customer and the finance company.

Held:

[1] From the oral and documentary evidence adduced, there was ample evidence justifying the learned Magistrate's conclusion that there existed the sale and purchase transaction of the van between the customer and the dealer, prior to the creation of the hire purchase agreement. From the evidence, this is not a case where the

a finance company bought the van by paying the dealer the purchase price in full and then let in on hire purchase to the customer but rather a case where the customer having paid the deposit, was unable to settle the balance on his own and had to seek a loan from the finance company for the purchase.

b [2] Since the transaction took place in 1983, by virtue of s. 5(2) of the Civil Law Act 1956, the law applicable in Sarawak for the purpose of this case is the English Sale of Goods Act 1979 (the 1979 Act), more precisely s. 12(2)(b) thereof. Although the Learned Magistrate and the Counsel for the customer were in error in relying on s. 14 of the Sale of Goods Act 1957 and s. 12 of the English Sale of Goods Act 1893 respectively, the errors did not affect the conclusion reached by the learned Magistrate as the result on the issue would be the same by the application of s. 12(2)(b) of the 1979 Act.

d [3] Based on the finding that there had been a sale of the van by the dealer to the customer, it is obvious that there had been a breach of the implied warranty of quiet possession of the van under s. 12(2)(b) of the 1979 Act. This is borne out by the undisputed evidence that the van was lawfully seized by the Customs Department on or about 13 May 1985.

e [4] The dealers contention that the Magistrate was wrong to invoke the Sale of Goods Act since the customer had used the van for about 2 years without any interruption and that the seizure was not caused by the dealer was without merit.

f [5] The implied warranty of quiet possession protects the buyer not only against all acts of the seller but also the lawful acts of third persons. If a buyer's full possession of goods is disturbed by a third party acting within his or its rights, the buyer is entitled to hold the seller liable and to be indemnified by the seller. The passage of time after the purchase, in itself, is no bar to the buyer's right of protection since time does not begin to run till the buyer's possession is disturbed.

g [6] As for the question of damages, the general principle is that the measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty, including consequential damages.

h [7] Although the claim for the price for repurchasing the van from the Customs Department

and the costs of repair of the van, being special damages, were not specifically pleaded, the customer had been allowed to give evidence relating thereto without any objection from or on behalf of the dealer. His evidence was in no way challenged and there was no reason to disagree with the award.

[8] The customer has adduced evidence to prove that he had suffered loss by reason of the wrongful deprivation of his use of the van. Considering that the customer was deprived of the use of the vehicle for about 5 years, the award of RM6,000 for loss of use is unquestionably modest, just and reasonable and the complaint that the learned Magistrate failed to give consideration to the evidence as a whole in arriving at the decision has no merit.

[Appeal dismissed with costs to be taxed unless otherwise agreed].

Cases referred to:

Ahmad Ismail v. Malayan Motor Company & Anor.
[1973] 2 MLJ 66 FC (**dist**)
Niblett v. Confectioners' Materials Co. Ltd. [1921] 3 KB 387 CA (**refd**)
Mason v. Burningham [1949] 2 KB 545 (**refd**)

Legislation referred to:

Civil Law Act 1956, s. 5(2)
Customs Act 1967, s. 115(1)(b)
Hire Purchase Act 1967, s. (1)(b)
Sale of Goods Act 1957, s. 14
Sale of Goods Act 1893, s. 12 (UK)
Sale of Goods Act 1979, ss. 12(2)(b), 53(2)(UK)

For the appellant- John Shek; M/s. John Shek & Co.
For the respondent- Peter Mijim; M/s. Battenberg & Talma

JUDGMENT

Chong Siew Fai J:

This is an appeal by the defendant against the decision of the learned Magistrate giving judgment against the defendant for the 1st plaintiff in the sum RM10,811 with interest at 8% per annum from the date of the judgment and costs.

The case is on a sale and purchase cum a hire-purchase arrangement of a motor vehicle i.e. a van bearing registration No. KJ 8275, involving, as is more often than not, financing by a finance company.

The action was brought by the 1st plaintiff and the 2nd plaintiff against the defendant for RM15,100 and/or damages resulting in an

a alleged breach of the implied condition of the defendant's right to sell and to give possession and sole and exclusive use and benefit of the van in that on or about 13 May 1985 the van was seized by the Royal Customs and Excise Department, Kuching on the ground that "it is a material evidence to a customs case under investigation regarding its import". There was also a claim for interest and costs.

b For the purpose of this appeal, it is convenient to refer to the 1st plaintiff as the customer, the 2nd plaintiff as the finance company, and the defendant as the dealer.

c The following facts are not in dispute:

1. In the purchase of the van at RM13,500, the customer negotiated and paid the dealer a deposit RM5,500 (which, however, was disputed by the dealer whose sales credit manager DW2 said the customer paid only RM5,200). The payment of RM5,200 was supported by 2 receipts of the dealer dated 12 January 1983 and 20 January 1983 (Exh.P3 and Exh. P2) respectively.
2. The balance of the price of the van RM8,000 was financed by the finance company with whom the customer entered into a hire purchase agreement dated 24 January 1983 (Exh. P1) under which the customer agreed to pay the rent RM8,000 plus terms charges RM1,600 by 24 Rent Instalments of RM400 each.
3. The rent and terms charges of RM9,600 were fully settled by the customer to the finance company on 25 January 1985 and the registration card of the car was returned to the customer upon the settlement.
4. On 13 May 1985, the van together with the registration card was seized by the Customs & Excise Department, Kuching.
5. Immediately after the van was seized, the customer informed the dealer about the seizure and was told by DW1 that they (the dealer) had bought the vehicle from an importer.
6. On or about 7 May 1990, the Customs and Excise Department sold back the van to the customer for RM500 (Exh.P6).

d In her judgment, the learned trial Magistrate dismissed the claim of the finance company on the ground that the latter having been paid by the customer all the amount under the

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hire-purchase agreement, had, on evidence, suffered no loss or damage. As for the customer, she held that in relation to the van there was a sale and purchase agreement, though not in writing, between the customer and the dealer. This is what she said:

- (1) I do believe that there is this sale agreement entered into between the 1st plaintiff and the defendant when the defendant agreed to sell the said van to the 1st plaintiff by arranging a finance for the 1st plaintiff with the 2nd plaintiff under hire purchase agreement. The peculiarity of this arrangement of hire purchase is that the 2nd plaintiff immediately became the owner of the said van until payment fully settled by the 1st plaintiff. Then again it does not actually wiped out the sale agreement that took place between the 1st plaintiff and defendant.
(Page 35 of the Appeal Record).
- (2) Now, in holding that there is this sale of goods agreement between the 2 parties, ... It is obvious that there was no written agreement
(Page 36 of the Appeal Record).

The learned trial Magistrate then went on to hold that there had been, on the part of the dealer, a breach of the implied warranty of having and enjoying quiet possession of the goods by reason of the seizure of the van by the Customs & Excise Department as well as a breach of the implied warranty of freedom from any charge or encumbrance in favor of any third party by the reason of the customer having to pay to the Customs & Excise Department a sum of RM500 to buy back the van from the Customs and Excise Department under the s. 115(1)(b) of the Customs Act 1967. (Page 38 of the Appeal Record).

After dealing with the issue of damages, she awarded the total sum of RM10,811.10 to the customer against the dealer with costs.

The first question to consider is: Was the learned trial Magistrate justified in holding that there had been a sale of the van by the dealer to the customer prior to the entry of the hire-purchase agreement (Exh. P1) between the customer and the finance company? This may be considered from 3 aspects:

- (A) the pleadings;
- (B) the witnesses' evidence; and
- (C) the documentary evidence.

a (A) *Pleadings*

On the pleadings, this has been put in issue. (See paragraph 1 of the amended statement of claim and paragraph 1 of the amended defence on pages 57 and 59 of the Appal Record respectively).

b (B) *Witnesses' evidence*

As regards the evidence:

- (1) PW1, the credit officer of the finance company said:

- (i) This is the amount that the dealer is selling the vehicle to the hirer.

(Page 14 of the Appeal Record);

though under cross-examination, he said:

- (ii) I agreed that in pursuant to P1, our company has bought over the vehicle from the dealer and hired it out to Encik Osman bin Abdullah. Therefore P1 was signed between our company and Encik Osman.

Based on P1, I agreed that Encik Osman bought the vehicle from our company.
(Page 15 of the Appeal Record).

- e** Pausing here, it may be noted that the above evidence of PW1 under cross-examination is based on Exh. P1, i.e. the hire-purchase agreement between the finance company and the customer.

- f** (2) PW2, the customer said:

In January 1983, I had a dealing with one Heng Long Motor Trading Company whereby I bought a Toyota Town Ace Van bearing registration No. KJ 8275 from them with a cash deposit of RM5,500 paid.
(Page 16 of the Appeal Record).

- g** This point was not specifically cross-examined upon.

- (3) DW1 Goh Swee Heng, the proprietor of the dealer said:

- h** (i) My company did sell a car to him.
(Page 24 of the Appeal Record);

- (ii) The vehicle was sold to Osman under my company's name.
(Page 25 of the Appeal Record).

However, under cross-examination, DW1 also said:

- i** (iii) I also told him (meaning the customer) to see Affin Credit (M) Sdn.Bhd. I told him so

because we have sold the car to Affin Credit (M) Sdn. Bhd.
(Page 24 of the Appeal Record).

It may be noted that according to DW1 himself, this remark of his was made to the customer when the latter told him about the seizure of the van by the Customs.

(4) DW2 Goh Mui Cheng @ Goh Swee Cheng, the then sales manager of the dealer company, said:

- (i) Sometime in January 1983, one Osman bin Abdullah did come to see me to purchase a Toyota Town Ace Van (Petrol) at RM13,500. He did not pay in full. He paid a down payment of RM5,200. (Page 26 of the Appeal Record);
- (ii) The vehicle was subsequently registered under Osman bin Abdullah's name. The Registration number is KJ 8275. (Page 27 of the Appeal Record);
- (iii) After the sale of the van to him, he did not come back to see me. (Page 27 of the Appeal Record); and
- (iv) Under cross-examination, DW2 said:
After he had paid RM5,200, we released the vehicle to him.
(Page 28 of the Appeal Record).

(C) Documentary evidence

As regards the documentary evidence, the 2 receipts of the dealer Exh. P2 and Exh. P3 clearly indicate that a total sum of RM5,200 was paid by the customer and one Mdm Ting Hung Ing to the dealer on 20 January 1983 (RM4,200) and on 12 January 1983 (RM1,000) respectively. The 2 receipts expressly stated the payments as 'down payment' or 'deposit' for van. Furthermore, in the hire-purchase agreement Exh. P1, the deposit of RM5,500 was excluded from the amount stipulated to be paid in the 24 instalments to the finance company. More significantly, there is no evidence whatever that this deposit of RM5,500 was paid by the customer to the finance company. The oral evidence establishes without doubt the sum of either RM5,500 or RM5,200 was paid by the customer to the dealer vide receipts Exh. P2 and Exh. P3. Indeed, in face of the record, learned Counsel for the dealer had but to concede that there was evidence of sale of van to the customer.

From the oral and the documentary evidence referred to above, there is ample material justifying the learned trial Magistrate coming to the

- a conclusion that there existed the sale and purchase transaction of the van between the dealer and the customer, prior to the creation of the hire-purchase agreement (Exh. P1). From the evidence, this is NOT a case where the finance company bought the van by paying the dealer the purchase price in full and then let it on hire purchase to the customer but rather a case where the customer having paid the deposit, was unable to settle the balance on his own and had to seek a loan from the finance company for the purchase. That was how the hire-purchase agreement was created. In this connection, it is noted that when the customer went to see DW1 about the seizure by the Customs, DW1 had told him that they (dealer) had sold the vehicle to Affin Credit (M) Sdn. Bhd. (finance company) (see page 24 of the Appeal Record). However, this cannot be the position since there is evidence including that of DW1 himself, on which the learned trial Magistrate concluded that there had been a sale of the vehicle by the dealer to the customer prior to the hire-purchase arrangement with the finance company. With that conclusion, I respectfully agree.
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I am fully aware that in *Ahmad Ismail v. Malayan Motor Company & Anor* [1973] 2 MLJ 66 FC, the plaintiff/hirer, like the customer in our case, himself paid the initial part of the price by surrendering his own car and in cash, and had the balance raised by entering into a hire-purchase agreement with a financial company.

- f Unlike in our present case where the customer and the finance company jointly sued the dealer, in *Ahmad Ismail's* case, *supra*, the plaintiff/hirer sued both the car dealer and the finance company. Another important feature in *Ahmad Ismail's* case is that the Federal Court did not hold that there was no sale between the car dealer and the plaintiff/hirer. It held that there was such a sale but that it was ultimately superseded by the hire-purchase agreement between the plaintiff/hirer and the finance company and accordingly ruled that the plaintiff's claim against the car dealer failed. (See page 67 1st Col. I).
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- h There is, in my view, good reason for the above decision because a perusal of the judgement will show that in that case the plaintiff sued both defendants for breach of contract and the alleged breach was that of a condition implied by s. (1)(b) of the Hire Purchase Act 1967. In other words, in *Ahmad Ismail's* case the plaintiff
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founded its action upon the Hire Purchase Act 1967, whereas in the instant case, the plaintiff relied on the Sale of Goods Act 1893 though the Act was not specifically pleaded as such. For the above reasons, I agree with the view of the learned trial Magistrate that *Ahmad Ismail's* case, *supra*, is not applicable to our present case.

Before going further, I would say a word about the references to the Sale of Goods Act by learned Counsel for the customer and by the learned trial Magistrate. In his submission in the lower Court, Counsel referred to s. 12 of the Sale of Goods Act 1893 (English) whereas the learned trial Magistrate in her judgement relied on s. 14 of the Sale of Goods Act 1957 (West Malaysia). Both sections are identical. In my view, since the transaction took place in 1983, by virtue of s. 5(2) of the Civil Law Act 1956, the law applicable in Sarawak for the purpose of this case is the Sale of Goods Act 1979 (English), more precisely, s. 12(2)(b) thereof. However, despite the errors, the conclusion of the learned trial Magistrate is not affected since, so far as relating to our instant case, the result on the issue would be the same by the application of s. 12(2)(b) of the said 1979 Act.

Based on the finding, which is supported by evidence and with which I respectfully agree, that there had been a sale of the van by the dealer to the customer, it is obvious that there had been a breach of the implied warranty of quiet possession of the van under s. 12(2)(b) of the Sale of Goods Act 1979. This is borne out by the undisputed evidence that the van was lawfully seized by the Customs And Excise Department on or about 13 May 1985 and was resold to the customer for RM500 on or about 7 May 1990 (i.e. nearly 5 years later).

Section 12(2) of the Sale of Goods Act 1979 provides:

In a contract of sale, other than one to which subsection (3) below applies, there is also an implied warranty that -

- (a) ...
- (b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

For the dealer, Counsel argued that the learned trial Magistrate was wrong to invoke the Sale of Goods Act since the customer had used the van

- a for over 2 years without any interruption and that the seizure by the Customs And Excise Department was not caused by the dealer. With respect, I am unable to agree. The implied warranty of quiet enjoyment protects the buyer not only against all acts of the seller but also the lawful acts of third persons. If a buyer's full possession of goods is disturbed by a third party acting within his or its rights, the buyer is entitled to hold the seller liable and to be indemnified by the seller. *Niblett v. Confectioners' Materials Co. Ltd.* [1921] 3 KB 387 CA. And, in *Mason v. Burningham* [1949] 2 KB 545 it was held that the warranty was wider and could be invoked by a buyer where someone claiming by title paramount, e.g. the true owner of the goods, disturbed his possession (page 563). The passage of time after the purchase, in itself, is no bar to the buyer's right of protection since time does not begin to run till the buyer's possession is disturbed.
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This disposes of grounds of appeal Nos. 2, 3, 4 and 5.

Damages

- e I now come to the question of damages. As a general principle, the measure of damages for breaches of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty (Section 53(2) of the 1979 Act). This includes consequential damages. Thus in *Mason v. Burningham* [1949] 2 KB 545 the plaintiff was awarded costs of overhauling the typewriter that was found to have been stolen.
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It is clear from the judgement of the learned trial Magistrate in our instant case that the award of RM10,811.10 was arrived at as follows:

- g (1) RM 500.00 being price for repurchasing the van from the Customs And Excise Department;
- (2) RM 4,311.10 being costs of repair of the van; and
- (3) RM 6,000.00 being loss of use.
- h RM10,811.00

Although items (1) and (2), being special damages, were not specifically pleaded, the customer had been allowed to give evidence relating thereto without any objection from or on behalf of the dealer.

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Ground 6 of the Appeal reads:

The learned Magistrate erred in law and in fact in holding the opinion that exhibit P7 A-E had not been challenged by the defendant and awarded the sum to the 1st respondent.

In his submission Counsel for the dealer submitted that the documents tendered for identification as "ID7 (a-e)" were challenged and were never tendered as exhibits. He also submitted that the sum RM4,311.10 should not have been allowed in that authorship of the documents was not proved. Putting it at the lowest, I find the submission of Counsel relating to the documents contrary to what was recorded to have taken place during the trial. A perusal of the notes of proceedings of the trial Magistrates' Court clearly shows that although the documents were initially challenged, they were subsequently admitted in evidence and marked as exhibits P7 (a-e) after Counsel for the dealer indicated to the Court that he would not object to the documents being marked as exhibits. Counsel also informed the trial Court that he did not wish to cross-examine the customer respecting the exhibits (see pages 18 and 23 of the Appeal Record).

Before me, learned Counsel for the dealer stated that he did not say in the lower Court that he would not object to ID7 (a-e) being admitted in evidence and would not cross-examine PW2. I am not prepared to accept the statement. In his initial submission before me, learned Counsel for the dealer said none of those things. He raised them only in his reply after the matters (i.e. admission of the documents as exhibits and his stand of declining to cross-examine) were pointed out by learned Counsel for the customer. The notes of evidence cover only 15 pages of the Appeal Record; the exhibits were also specifically mentioned in the judgment of the learned trial Magistrate. It is difficult to accept that the recorded remarks of Counsel about not objecting to the documents being admitted in evidence and not cross-examining PW2 could have totally escaped the notice of any reasonably prudent and careful Counsel especially when the admission of the documents in evidence was made a specific ground of appeal. If Counsel were serious about the matters, steps should have been timely taken to have them investigated into and, if found justified, to have the relevant part expunged from the record. It would not be right to have the substance of the record altered by a mere statement from the Bar

a particularly when the statement does not find support from the opponent.

In his evidence the customer testified that after recovering the van through repurchasing, the vehicle was not functioning at all and had to be repaired costing him RM4,311.60. The name of the workshop and its address were given. His evidence was not in any way challenged. The learned trial Magistrate obviously accepted his evidence as the truth and awarded the sum RM4,311.10. On the evidence, I see no reason to disagree with the award.

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c This ground must fail.

Ground 8 of the Appeal states:

The Learned Magistrate failed to give consideration of the evidence of the whole case in arriving at the decision that the appellant shall pay the 1st respondent a nominal sum of RM6,000 as loss of use to the said van without giving any reason.

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Loss of use may be claimed in the form of general damages. So claimed, it is usually a matter of assessment based on the evidence adduced. To some extent, the damage may have to be inferred or presumed. In our instant case, the customer has adduced evidence to prove that he had suffered loss by reason of the wrongful deprival of his use of the van and has attempted to quantify the loss he thereby suffered in the region of RM30,000. The learned trial Magistrate, however, rejected the amount and considered a sum of RM6,000 reasonable. The complaint that the learned trial Magistrate failed to give consideration to the evidence as a whole in arriving at the decision has no merit. In my view, considering that the customer was deprived of the use of the vehicle for about 5 years, the award of RM6,000 is unquestionably modest, just and reasonable.

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Ground 7 of the Appeal reads:

The Learned Magistrate erred in law and in fact in allowing a total sum of RM10,811.10 to the 1st respondent without considering and failed to appreciate the evidence of the whole case.

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I have dealt with the awards on the costs of repair and the loss of use. There remains the sum of RM500 being the amount for the repurchasing of the van from the Customs And Excise Department. The customer gave evidence on the repurchase of the van at RM500 without any

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objection; and his evidence in this respect was not challenged. *a*

For the dealer, learned Counsel argued that Exh. P6, the receipt for the payment of RM500 was not proved in that the maker thereof was not called. According to the notes of proceedings, Exh. P6 was admitted in evidence "with no objection from defendant's solicitor" (see page 18 of the Appeal Record). In any event, there is ample credible evidence from the customer justifying the award of the sum RM500. I see no reason for disagreeing with it.

For the reason given, the appeal is dismissed with costs to be paid by the dealer (the appellant) to the customer (the respondent). In the absence of an agreement, such costs are to be taxed.

IBRAHIM BIN HASHIM

v.

**BANK BUMIPUTRA MALAYSIA
BERHAD**

HIGH COURT MALAYA, SHAH ALAM
DATO' RANITA HUSSEIN JC
[CIVIL SUIT NO. 22-518-92]
8 JUNE 1994

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INJUNCTION: Locus Standi - Whether son has locus standi to maintain an application for injunction against auction sale of charged property in father's name - Whether illegality can be raised at the hearing without being pleaded in the affidavit - Effect of delay of 5 years in seeking injunction - Application of s. 260(2) National Land Code.

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The plaintiff's father had availed of banking facilities from the defendant bank. He had charged two pieces of land in Sabak Bernam as security for the facilities. The defendant bank had in accordance with s. 260(2) of the National Land Code made a demand for payment in Form 16 E addressed to the chargor and thereafter made an application in Form 16 G to the Land Administrator and obtained an order for sale on 5 May 1987. The plaintiff applied for an injunction on 31 July 1992 to restrain the auctioning of the two pieces of land.

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The plaintiff contented that the loan has been discharged by him at the request of his father and that the order for sale is tainted by illegality as the bank had not served the letter of demand on the chargor. The alleged illegality was not pleaded in the affidavit.

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The bank stated that the plaintiff does not have *locus standi* to maintain the application for an injunction. Further the issue of delay also was raised in defence.

Held:

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[1] The plaintiff has failed to show what his interest in the matter is either in the statement of claim or the affidavits filed in support of the injunction application. That he is the son of the chargor, in the absence of any other evidence, does not entitle him to any equitable or legal interest in the lands. The land is in his father's name, and the privity of the contract, in respect of the charge is between the father and the bank.

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The plaintiff has no *locus standi* to maintain the application for an injunction.